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No. 643

In the

Supreme Court of the United States

OCTOBER TERM, 1959

LOUISIANA & ARKANSAS RAILWAY COMPANY,
Petitioner,

v.

J. C. MULLINS, JR.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SIXTH SUPREME JUDICIAL DISTRICT OF TEXAS

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SIXTH SUPREME JUDICIAL DISTRICT OF TEXAS

To the Honorable Supreme Court of the United States:

The Louisiana & Arkansas Railway Company, hereinafter called petitioner, prays that a writ of certiorari issue to review the judgment of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas. The petitioner has filed a separate appendix under Rule 12(1)(f). The pages therein will be referred to by the designation S. A. Where it is necessary to refer to the record, the indices employed by the clerk of the court below will be referred to, the pages being those appearing in each separately numbered instrument as numbered by such clerk.

OPINION BELOW

The opinion of the Court of Civil Appeals appears at Appendix A. It is reported: *Louisiana & Arkansas Railway Company v. Mullins (Civ. App., 1959), 326 S. W. 2d 263.*

JURISDICTION

The judgment of the court below is dated the 16th day of June, 1959 (R. 23), the opinion affirming the judgment being dated the same date, and such judgment and opinion being rendered upon the petitioner's motion for a rehearing. In order to exhaust its remedies in the courts of Texas, petitioner was bound to file an application for a writ of error to the Supreme Court of Texas. Such court refused its application on October 14, 1959; petitioner filed a motion for rehearing, which was overruled by the Supreme Court of Texas on November 11, 1959. (R. 27.) The judgment of the court below thus became final on such date of November 11, 1959.

The jurisdiction of this court is invoked under the provisions of *28 U. S. C., Sec. 1257(3).*

QUESTIONS PRESENTED

No questions of liability of petitioner under the FELA are before this court; liability was admitted in the trial court.

The "special and important" reason for the granting of this application is because of the imposition by the courts of Texas of elements of damages by judicial fiat which are not within the FELA as enacted by Congress and construed

by this Court and other United States courts. It is a known and established fact that railroads generally are financially distressed. The holding of the courts below imposes confiscatory financial burdens upon petitioner and will, if allowed to stand, impose such burdens upon other members of such industry. Such burdens were not created by Congress and, so far as the petitioner can ascertain, have never been held to be proper by this Court. Petitioner respectfully seeks a review and a decision of the following questions:

QUESTION NO. 1. Whether an injured employee in an FELA case can prove the premium cost to him of a refund annuity, which insures the amount of his monthly earnings, together with speculative increases for the entire period of his life expectancy, utilizing such life expectancy as a multiplicand. (S. A. 2.)

QUESTION NO. 2. Whether an injured employee can prove and recover as an element of damages under the FELA loss of his love and affection for his wife and daughter and mistreatment of his wife and daughter after the injuries, together with the pain and suffering which such injured employee caused them. (S. A. 6.)

QUESTION NO. 3. Whether in an FELA case the trial court is bound to grant the request of the defendant (petitioner) to charge the jury that the amount of the verdict is not subject to income taxes. (S. A. 18.)

QUESTION NO. 4. Whether over the objection of the defendant in an FELA case and also in the face of a requested charge the trial court could refuse to submit the correct mathematical formula for the reduction of the award to its present cash value. (S. A. 19.)

STATUTES INVOLVED

The statutes involved are: *35 Stat. 65, as amended 36 Stat. 291; 53 Stat. 1404; 45 U. S. C., Secs. 51 et seq., Vol. 4, p. 6480.* Section 51 reads as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

STATEMENT

Trial to a jury resulted in a verdict and judgment in favor of the plaintiff (respondent) in the sum of $150,000.00.

The only questions upon which a review is sought are federal ones and each question asserts the point involved. It is the position of the petitioner that it was denied a fair trial under the FELA and its interpretation by the courts of the United States; that it is entitled to a new trial as a matter of law. Before petitioner is required to pay the sum of $150,000.00, legal and competent evidence with respect to damages sustained and the elements thereof. Also a proper charge under the FELA should be applied by the courts of Texas as a matter of law.

If the petitioner is incorrect in this position and the court is going to look to the entire record to determine whether such erroneous and improper action of the courts below upon the questions presented prejudiced the petitioner upon the trial of the cause. it is respectfully submitted that the record does not sustain the imposition of $150,000.00 as damages. The plaintiff is not a total wreck; he is not an amputee; he is not a mere living hulk. As recognized by the opinion of the court below, he is not totally disabled and incapacitated for all gainful pursuits. He drives an automobile around his home town of Greenville, Texas; he is able to mow the lawn and trim whatever foliage is in the yard. (S. A. 23.)

REASONS FOR GRANTING WRIT

Each question will be discussed in its numerical sequence without restating the same.

QUESTION NO. 1

The decision below should be reviewed, because neither this Court nor any court of the United States has ever held that a plaintiff in an FELA case can prove a single premium for the purchase of a refund annuity as the legal and proper measure of damages. This cause was tried upon the theory that the premium necessary for the purchase of a refund annuity was the proper measure of damages and the courts below have held that it is. Such action results in income insurance for the life expectancy, job protection for such period, and it is to all intents and purposes requiring the railroad to insure its employees' income for an arbitrary life expectancy period, as well as insurance that the position would have existed for the life expectancy period; that the plaintiff would have kept his health and been able to perform his duties. The question which was asked the actuary and admitted over the objection of the petitioner, omitting immaterial parts, was as follows:

> "• • • will you please figure for us the amount of a single premium necessary for the purchase of a refund annuity which would provide an annual income during the expectancy of life that J. C. Mullins, Jr. will have from February 12, 1958, at the following specified monthly income payments: (a) $517.00 per month; (b) $540.00 per month; (c) $575.00 per month; (d) $600.00 per month; (e) $625.00 per month."

To such direct interrogatory the witness answered (omitting immaterial portions): (Italics the writer's.)

> "• • • Using the Commissioner's 1941 Standard Ordinary Mortality Table and a rate of interest of 2½% per annum, compounded annually, *I have com-*

puted the various specified monthly income payments, single premiums, to be: a. single premium for $517.00 per month is $126,881.62; b. single premium for $540.00 per month is $132,526.26; c. single premium for $575.00 per month is $141,115.93; d. single premium for $600.00 per month is $147,251.40; e. single premium for $625.00 per month is $153,386.88."

The action of the trial court in overruling petitioner's objection to the above quoted testimony was preserved by exception, the court granting a full bill. It was also preserved by exception to the action of the trial court in overruling a motion to strike the entire deposition of the actuary; it was assigned as error in the petitioner's amended motion for a new trial and was decided adversely by the court below. (S. A. 2-7.)

The above quoted testimony was the only evidence before the court and jury upon the very crucial issue of the present cash value of the pecuniary benefits which plaintiff would have in all reasonable probability received. The courts below have tried and disposed of the cause upon the premise that the railroad insured plaintiff's income, together with speculative increases, for the period of his life expectancy (28.43 years as testified by the actuary). Such testimony was calculated to cause the jury to believe that the award of a single premium was proper. This Court has had occasion to recently consider the nature of a refund annuity.[1]

Although counsel for plaintiff, in propounding the question to the actuary, deliberately used the term "refund

[1] *Securities and Exchange Commission v. Variable Annuity Life Ins. Co., 3 L. Ed. 2d 640, 79 S. Ct. 618, 359 U. S. 65.*

annuity" and the actuary testified with regard to the amount necessary to purchase a "refund annuity" by a single premium, the court below held that neither the actuary nor counsel intended to use such term and were not introducing the figures in evidence for such a purpose.

The cases decided by this Court which are cited in support of such action do not sustain the court below.[2] Such cases do not hold that a railroad insures an injured plaintiff for his life expectancy or that the railroad is bound to insure his income for such a period. Such cases held that annuity tables were proper evidence in order to reach a present cash value or that the present value of a life annuity might be introduced in evidence; nowhere is it held that a railroad is bound to purchase a refund annuity for an injured plaintiff. The action of the courts below is contrary to the decided cases.[3]

There was no attempt by plaintiff to reduce to their present cash value any benefits which he would have received; no mathematical formula was testified to by the actuary and likewise no mathematical formula was contained in the court's instructions to the jury. The formula which has been established as a matter of substance by this Court has been wholly ignored by the courts below. Plain-

[2] *Vicksburg & Meridian Rwy. Co. v. Israel Putnam, 118 U. S. 545, 7 Sup. Ct. 1, 30 L. Ed. 257; C. & O. Rwy. Co. v. Kelley, 241 U. S. 485, 36 S. Ct. 630, 60 L. Ed. 1117.*

[3] *Weatherbee v. Elgin, Joliet & Eastern Ry. Co. (C.A., 1951), 191 F. 2d 302, p. 311; Bartlebaugh v. Pennsylvania R. Co., 82 N. E. 2d 853, p. 854, 150 Ohio St. 387.* The distinction between a refund annuity and a simple or straight annuity is delineated in *Dorothy A. Spence v. Commercial Motor Freight Lines, 127 N. E. 2d 427, 53 S. L. R. 2d 1445* and annotation following.

tiff has employed life expectancy as a multiplicand to insure income for the total period of his life expectancy. As a matter of simple arithmetic, an investment of the sums necessary to purchase a refund annuity, for the period of the life expectancy (28.43 years) at the safe investment rate (2½% per annum), would yield (principal and interest) more than plaintiff would have earned if he had kept his health and been employed for the period of the entire life expectancy. The single premiums involve the payment of more than wages and an insurance of more than income in defiance of a reduction to present cash value.

Most businesses in this country have a legal ceiling upon the amount which an injured employee can recover for personal injuries sustained in the course of his employment. The action of the courts below has made the railroad an insurer of income for life, thereby removing any ceiling which might have existed under the FELA.

The question here presented is a federal one of substance which has not been decided by this Court; it should be decided because of the grave and serious consequences which will result to petitioner and other railroads if a plaintiff is allowed to prove and recover the purchase price of a refund annuity.

QUESTION NO. 2

This question involves the allowance of an injured plaintiff protected by the FELA to prove his loss of love and affection for his family and the suffering which was caused them over the proper objection of the petitioner.

While a witness was on the stand the question was asked with respect to the plaintiff's attitude towards his wife and daughter prior to the accident. Such witness testified, over proper objection, that he was as good to his daughter as a man could be and interested in her welfare; that they were companionable. (S. A. 7-10.)

While plaintiff's wife was on the witness stand the question was asked with respect to what plaintiff's attitude and disposition towards his daughter were prior to the accident. Before an objection could be made the answer was, "Oh, we all had a good time, just a happy home, everybody was always happy." Upon objection, the court instructed the jury that it was to consider only the attitude of plaintiff towards his wife and daughter and not their attitude toward him. It would require a person of the most supreme naivety to believe that a jury would follow such an instruction. Yet the court below has so held. (S. A. 10-12.)

The trial court further permitted the wife of the plaintiff to inject her pain and suffering into the cause, over the objection of petitioner, by testifying that the plaintiff had never cried before the accident. Such injection was purely for prejudicial purposes and to bring before the jury the claimed disrupted family relationship. (S. A. 12-14.)

The court further permitted the plaintiff's wife to testify, over the proper objection of the petitioner, that plaintiff's attitude towards both of them was very harsh after the accident; that he kept his 13-year-old daughter upset and crying; that he never did act that way towards them before the accident. (S. A. 13-16.)

Plaintiff's wife also testified, before objection could be made, that she had never been struck by her husband prior to the accident. While the court gave an admonitory instruction to the jury with regard to such testimony, it would require a person of more faith than the writer to believe that the jury paid any attenion to such admonition. (S. A. 16-18.) In this connection there is an Arabian proverb which reads: "To the pure everything is pure." It is not possible that juries are pure enough to follow such admonitory instructions.

The action of the trial court in permitting the introduction of the above testimony, and also in connection with the above inflammatory evidence which was stricken, was properly preserved as error by objection and exception, assignments of error in the amended motion for new trial, and was duly raised in the court below. (S. A. 6-18.)

That it was the intention of counsel for the plaintiff to create prejudice appears from the argument of one counsel, wherein he in effect argued that it was the duty of the jury to send the plaintiff's daughter to college and keep plaintiff in the state of living to which he was accustomed. (S. A. 18.)

Another counsel argued to the jury that all that plaintiff had to do before the accident was work and play with his wife and with his child. (R. No. 8, p. 7.)

No federal court has ever held that poisonous evidence of the character which was before the jury in this cause could be introduced in an FELA case. It has been con-

sistently held that any reference to the family of a plaintiff in a personal injury suit is prejudicial error.[4]

So far as the writer can determine, no other case, either state or federal, has permitted the introduction of evidence of this character, either general or episodic, which will tend to arouse sympathy, or passions and prejudice against a defendant.

If it is proper to prove pain and suffering caused the wife and child by an injured plaintiff, there is truly no limit to the amount of damages which can be imposed under the FELA. In a recent case, where the family was merely incidentally referred to, such action was held improper, but in view of the orderly manner in which the trial was there conducted, the error was held harmless. There was more than a mere reference here; poison was injected and the entire argument of two counsel for the plaintiff was, in the opinion of the writer, nothing short of a tirade. (R. Nos. 8 and 10.) With such prejudicial evidence and incidents before the jury it was impossible for the petitioner to have received a fair trial.

This question is a federal one upon a matter of substance, which has been decided by the courts of Texas contrary to the decisions of this Court and the lower federal courts.

[4] *Pennsylvania Co. v. Roy*, 102 U. S. 451, 460, 26 L. Ed. 141; *Chesapeake & Ohio Ry. Co. v. Slojanowski*, 2 Cir., 191 F. 720; *Southern Pacific Co. v. Ralston*, 10 Cir., 67 F. 2d 958; *Bahr v. Northern P. Ry. Co.*, 101 Minn. 314, 112 N. W. 267; *Slattery v. Marra Bros.*, 2 Cir., 186 F. 2d 134-137; *Thompson v. Boles*, (C.C.A., 8th, 1941), 123 F. 2d 487, 494-495; *Affleck v. Chicago, Northwestern Ry. Co.*, (C.A., 1958), 253 F. 2d 249, p. 252.

[5] *Texas & Pacific Ry Co. v. Buckles*, 5 Cir., 232 F. 2d 257, cert. den. 351 U. S. 984, 100 L. Ed. 498, 76 S. C. 1052.

QUESTION NO. 3

An FELA case involves loss of future income in the form of wages. It also involves recovery for pain and suffering. This Court has never decided that a defendant in such a case is not entitled to an instruction that such award or recovery is not subject to income tax liability. It is realized that the majority of the courts have held that a defendant is not entitled to such a charge in a suit for personal injuries. In the opinion of the writer the reasons which are assigned by the courts which sustain a refusal are both specious and paradoxical. Better reasoned cases sustain the granting of such a request."

The requested charge merely informed the jury that the award was not subject to income taxes or taxes of any character and therefore such liability should not be considered in the determination of the amount of the award. (S. A. 19.) There was no request for the jury to reduce the award or to take such fact into consideration in determining the amount.

To hold that a railroad is not entitled to such protection where a plaintiff has proved loss of "income" and the amount necessary to insure him a return of "income" for the life expectancy period should be a denial of fundamental rights. All jurors are now income tax conscious and where such terms are deliberately employed by plaintiff,

"*Floyd v. Fruit Industries*, 144 Conn. 659, 136 A. 2d 918, 63 A.L.R. 2d 1378, ann. 1393; *Dempsey v. Thompson*, 363 Mo. 339, 227 S. W. 2d 675.

"*Stokes v. U. S.*, 2nd Cir., 144 F. 2d 82.

"*Maus v. New York, Chicago & St. Louis Rd. Co.*, 135 N. E. 2d 253, 165 Ohio St. 281.

the defendant railroad should have protection against the jurors' probable mistaken belief with regard to income tax liability.

This question is a federal one of substance which should be decided by this court. This point was properly preserved in the courts below. (S. A. 19.)

QUESTION NO. 4

The jury received no mathematical formula from the trial court. The charge of the trial court was not only contradictory, but was unintelligible. (S. A. 20.)

The petitioner objected and excepted to the instructions upon decreased ability to earn money in the future on the grounds that such instruction was upon the weight of the evidence, was confusing and unintelligible and it practically instructed the jury that they must be bound by the deposition of the actuary. (S. A. 21.)

The petitioner also requested an instruction to the effect that there was no assurance that plaintiff would have, but for the accident, continued in his employment as an engineer or fireman for the remainder of his life or the expectancy thereof; that the fact that plaintiff was subject to the rule of seniority should be taken into account; that there was no assurance that he would remain in the employ of the petitioner; that strained economic conditions or mechanical advancements, inventions, or improvements in transportation could result in the curtailment of the number of employees or the complete abolition of railroads as a means of transportation. (S. A. 22.)

Request was also made for a proper instruction which would have charged the jury that the award must be reduced to its present cash value by taking into consideration the rate of interest at which money could be safely and securely invested, deducting therefrom annually an amount equal to the rate of interest which would be returned thereon and making the balance the answer. (S. A. 22.)

Such point of error was duly presented to the court below (R. 12, p. 93), but was decided adversely without comment.

The petitioner was entitled to some character of instruction which informed the jury that there was no assurance as a matter of law that plaintiff would be employed for such life expectancy.[9]

Petitioner was likewise entitled to an instruction which presented to the jury a mathematical formula which could be understood and followed. If plaintiff contends that such requested charge was improper because it authorized the reduction of pain and suffering to its present cash value, the authorities upon this question are divided.[10]

So far as can be determined this court has not passed upon the question with respect to whether such reduction is proper in an FELA case. Until it has been finally deter-

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[9] *Thompson v. Camp (C.A., 6th), 163 F. 2d 396, cert. den., 333 U. S. 331, 92 L. Ed. 1116, 68 S. Ct. 458; Weatherbee v. Elgin, Joliet & Eastern Ry. Co. (C.A., 1951), 191 F. 2d 302; Avance v. Thompson, 387 Ill. 77, 55 N. E. 2d 57, 60;* technological advances should likewise be considered. *Chicago & Northwestern Ry. Co. v. Order of Rail Tel. etc., (C. A. 7th, 1959), 264 F. 2d 254, p. 258.*

[10] *Vol. 17 Ohio St. Law Journal, p. 430, 436, Note 151; Texas & Pacific Ry. Co. v. Buckles, 5 Cir., 232 F. 2d 257, cert. den. 351 U. S. 984, 100 L. Ed. 498, 76 S. C. 1052.*

mined, petitioner submits that it should not be deprived of the fundamental right to a correct mathematical formula which is intelligible and understandable by a jury.

This question is a federal one of substance which has been decided adversely by the courts of Texas and should be decided by this Court.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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PROOF OF SERVICE

I, O. O. Touchstone, one of the attorneys for Louisiana & Arkansas Railway Company, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 11th day of January, 1960, I served copies of the foregoing petition for writ of certiorari on the respondent, J. C. Mullins, Jr., by mailing same in duly addressed envelopes, with first-class postage prepaid, to respondent's attorneys of record, Messrs. Jones, Brian & Jones, P. O. Box 347, Marshall, Texas, and Honorable Joe Chapman, Sulphur Springs, Texas.

O. O. Touchstone

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APPENDIX A

No. 7110

LOUISIANA & ARKANSAS RAILWAY COMPANY,
Appellant

vs.

J. C. MULLINS, JR.,
Appellee.

Appeal from District Court of Hopkins County, Texas

ON MOTION FOR REHEARING

After consideration of appellant's motion for rehearing, the opinion dated April 14, 1959, is withdrawn in order to make certain minor deletions and express the views of the court in more apt language, and the following is substituted therefor.

This is an action authorized by the Federal Employers' Liability Act, Title 45, U. S. C. A., by railroad engineer to recover damages resulting from injuries received in a train collision. The judgment of the trial court is affirmed.

In the 8th Judicial District Court of Hopkins County, appellee, J. C. Mullins, Jr., as plaintiff, sought a recovery in the aggregate sum of $282,150.00 against appellant, Louisiana & Arkansas Railway Company as defendant. The Railroad Company admitted liability. Trial to a jury on the issues of damages alone resulted in a judgment in favor of appellee in the sum of $150,000.00. The judgment in its entirety is the subject matter of this appeal.

Twenty-three points of error have been briefed by the appellant. To condense the brief the points were grouped. Consideration of the questions presented by the points will follow the appellant's grouping, and minimum discussion of the questions and authorities will be made in the interest of brevity.

Counsel for Mullins submitted a question by written interrogatory to an actuary that contained this wording: "* * * will you please figure for us the amount of a single premium necessary for the purchase of a refund annuity which would provide an annual income during the expectancy of life that, etc. * * *" Appellant objected to the question containing the quoted language and was overruled. Thereafter appellant moved to strike the answer to the question containing the quoted language as well as certain other answers and exhibits of the actuary when they were tendered in evidence. The contention made is that the calculations of the actuary were erroneous because the Federal Employers' Liability Act did not permit the introduction in evidence of a single premium refund annuity formula in determining the present cash value of future earnings lost by reason of appellee's decreased ability to earn resulting from injuries for which appellant is liable.

Appellant's objection appears to be well taken under Bartlebaugh v. Pennsylvania R. R. Co., 82 N. E. 2d 853, 150 Ohio 387, if the facts and circumstances of the present case bring it within the purview of that case. Examination of the evidence reveals that the deponent Gammill testified that "a refund annuity as used in the case of this problem

means an annuity which would be payable over the life expectancy period of the annuitant, at the end of which period the principal amount invested or single premium, with interest allowed on remainder invested at the rate of 2½% per annum, compounded annually, would be exhausted." He further testified that his computations of a single premium for the annuities inquired about were made on the assumption that the amount paid in as well as the interest earned would both be exhausted at the end of the life expectancy of J. C. Mullins. The term "refund annuity" was not defined in the instructions to the jury, nor was the jury advised that the term had any special meaning or a meaning different from that given it by Gammill in his deposition. The term "refund annuity" is not shown by this record to have a special meaning or significance apart from the word "annuity". Under this record there is no showing of any harm that befell the appellant by reason of the use of that term. Any error in the use of "refund annuity" in the interrogration is harmless and under Rule 434, V. A. T. R., judgment cannot be reversed for that reason.

The actuary in response to the question containing the language first quoted and to several related questions, assumed Mullins to be 41 years of age at the date from which payments would be made; then using the Commissioners 1941 Standard Ordinary Mortality Table showing a life expectancy of 28.43 years and a rate of interest of 2½% per annum, compounded annually, he computed various specified monthly payments on a single premium basis. He testified that a single premium of $126,881.62 would pro-

duce a monthly income of $517.00 over the term of Mullins' life expectancy; that $132,526.26 would produce $540.00 per month; $141,115.93 would produce $575.00 per month; $147,251.40 would produce $600.00 per month; and $153,386.88 would produce $625.00 per month. In addition, with his answers there was tendered three exhibits explaining his calculations.

It is concluded that no error is shown and this testimony and the exhibits made in explanation of it are admissible under authority of Vicksburg & Meridian Rwy. Co. v. Israel Putnam, 118 U. S. 545, 7 Sup. Ct. 1; 30 L. Ed. 257; C & O Rwy. Co. v. Kelley, 241 U. S. 485, 60 L. Ed. 1117; H. & T. C. Ry. Co. v. Willie, 53 Tex. 318; T. & N. O. R. R. Co. v. Jacks, 306 S. W. 2d 790, wr. ref., n. r. e.; M-K-T Rwy. Co. v. Wright, 311 S. W. 2d 440, wr. dis. by agreement.

The trial court's admission in evidence of testimony of appellee's attitude toward his wife and 13-year-old daughter, his emotional changes and violence toward his wife before and after injury are the subject of the next group of points. Evidence was admitted that from an indulgent, thoughtful, forbearing and kindly disposition towards his wife and daughter, he changed after injury to a harsh, tyrannical and domineering husband and father. And that prior to injury he never struck his wife, but did on one occasion afterwards. In connection with this last incident, Mullins' hospital chart, introduced into evidence without objection, recited: "• • • Patient suddenly upset, fighting, slapped wife and nurse several times before controlled." The wife as a

witness testified that Mullins had never slapped her before the injury. To this testimony objection was made, the court sustained it, and instructed the jury not to consider the answer. The wife testified that prior to his injury she had never heard Mullins cry, but after injury he cried on occasion. Appellant views all of this testimony as being adduced to support issues which could not properly be raised in the lawsuit. In other words, that loss of love, affection and grief are not elements of damages under the FELA nor is the wife and daughter's loss and suffering compensable. The appellant says the consequence of this testimony is to inject illegal, speculative and remote elements of damage that are not recoverable. And it contends that the admonitory instructions could not remove the inflammatory and prejudicial effect of the testimony regarding Mullins' not striking his wife prior to injury. The evidence regarded as a whole, it asserts, was so harmful, inflammatory and prejudicial that an instruction to limit the jury's consideration of it would not remove its ill effect and therefore no instruction to limit the purpose for which the evidence might be considered was requested.

In the trial court and here the appellee's stated reason for offering the testimony was to show a personality change resulting from Mullins' injury. Evidence was tendered raising an issue of a brain injury to Mullins and expert testimony was adduced to show that personality changes, that is, changes in temperament, disposition and nature, are symptomatic of brain injury. The testimony is admissible under authority of McGrew v. St. L. S. F. R. R. Co., 74 S.

W. 816, wr. dis., w. o. j.; Gulf, C. & S. F. R. Co. v. Moore, 68 S. W. 559; Western Union Telegraph Co. v. Simmons, 75 S. W. 822, n. w. h.; Title, Damage, 13 Tex. Jur., Sec. 85, p. 183, Sec. 87, pp. 185-186.

The instruction to the jury made harmless any error that could have adhered to the admission of the testimony that Mullins did not strike his wife before his injury. Such testimony at most is immaterial and neither it nor the other testimony considered in this group of points is shown to be of such harmful nature as to require a reversal.

The wife of the appellee under direct examination was testifying to her husband's condition when she first saw him at the hospital and related the length of time after seeing him before there was any indication that he was alive. She testified that she first observed a sign of life when he moved one eyelid. Her counsel then asked if appellee had been moved out of the room up until that time, and her reply was: "No, sir; they wouldn't even clean him up." Counsel then asked how long it was before Mullins was cleaned up. Objection was made that any answer to their last question would be irrelevant, immaterial, prejudicial and inflammatory, and motion made to instruct the jury to disregard it; the objection was sustained and no answer given, and the jury was instructed not to consider the question asked. Also grouped with the points bringing for review the action of the court in connection with the testimony just related is a point regarding testimony given by the wife that she and appellee no longer had a farm that they owned at the time of the collision. This testimony was

withdrawn from the consideration of the jury after objection and on motion by appellant's counsel. The third point in this group is that the accumulated prejudicial and harmful effect of this inadmissible evidence along with the testimony considered in the previous group of points was such that the defendant's right to a fair trial was completely destroyed. The contention of appellant cannot be sustained. No motion to declare a mistrial was made and the instruction requested was given by the court. It seems to be well settled that if error was committed in posing such questions, and the answers in evidence, it was cured by the instructions and admonition of the court. See Title, Trial—Civil Cases, 41-B Tex. Jur., Sec. 128, p. 156; Sec. 168, p. 197.

The next grouping requires a review of argument which it is asserted was improper and reasonably calculated to cause and probably did cause the rendition of an improper verdict and the entry of an erroneous judgment thereon, and was out of the record and so prejudicially inflammatory that its effect as a whole could not be removed by objections and admonitory instructions.

It is not feasible to reproduce a verbatim statement of the argument under attack and the record or remarks of opposing counsel which are said to justify the argument. An attempt will be made to synopsize a sufficient amount of the argument to indicate its extent and burden. It is realized that such presentation can not be entirely satisfactory to the parties as it will not emphasize all possible aspects of the argument. Counsel on both sides used illus-

trations extensively in their argument. Appellant's counsel with reference to the amount of $287,000.00 sued for pointed out that at $100.00 an acre it would purchase 28,700 acres of land. Also that $100,000.00 would buy 10 brick buildings in Sulphur Springs, or 20 to 25 residences. It was stated that such a recovery would make the appellee a capitalist as $100,000.00 would be the capital stock of two banks at $100.00 per share. A suggestion was made that if the appellee had received a similar injury in a head-on collision between two trucks owned by a farmer in Hopkins County, neither counsel nor the appellee would come into court asserting damages in the amount sought from the Railroad Company on pain of being laughed out of court. The inimical effect of the give-away television programs was alluded to with an implication that judgments of the nature sought would bankrupt the railroads and that juries should be careful with other people's money. The fair and honorable attitude of the Railroad in admitting its responsibility for the unfortunate collision and its reasonable and just intention to pay for the damage Mullins suffered was given emphasis. The Railroad's counsel cast upon appellee the odium of asking a jury to do an unconscionable thing by awarding him the amount he sued for. The plaintiff's posture in the suit was charged to be neither fair nor reasonable and the jury was exhorted to be impartial and treat the Railroad as it would a farmer in the illustration counsel had used.

Counsel for appellee, referring to local counsel's argument that the jury should reduce appellee's damage claim,

acknowledged the quality of cattle raised by such counsel and stated that he had heard a rumor that a short time previously counsel had sold a Jersey bull for $10,000.00. Objection was made and the jury instructed not to consider appellee's counsel's statement for any purpose. Appellee's counsel then continued with his illustration and impersonalized it by referring to any $10,000.00 bull and asserting that if it was killed in an accident the jury would be willing to award the owner full damages. In a variation of the theme, another of appellee's counsel offered the supposition that the farmer in the illustration who had the two trucks in collision was the one owning the 28,000 acres or the $10,000.00 bull that had been mentioned.

Perhaps of more serious import, counsel for appellee asserted in his argument that appellant would have a jury tell the appellee to get a broom handle and pick paper off the school grounds for a living and deprive appellee's daughter of a college education and the appellee of the livelihood to which he was accustomed. At another point appellee's attorney asserted that he did not mind being called unconscionably unfair if his accusers would omit platitudes and glorification of the jury system and say how much they thought the appellee had been damaged in dollars and cents, ending with this language; carrying the implication that the Railroad was saying to the jury; "Oh, we won't do the dirty work of cutting these figures down, you do the dirty work for us, we won't do, no, we won't dare tell you what we think is a proper amount." Objection was made to the argument as prejudicial and inflammatory which was sus-

tained and the jury admonished not to consider it. In other argument counsel for appellee referred to certain elements of the damages being sought as having a niggardly value placed upon them for the purpose of illustration and proceeded to make calculations involving hours of suffering, and compensation therefor at the rate of $10.00 per hour as well as the same type of argument with reference to days and years of disability and its value by the day; and then giving a resume of his version of the testimony of the various doctors who had testified which appellant claims was inaccurate and not supported by the record. Appellee's counsel repeated a Mark Twain joke which, among other things, illustrates that humor has little place in the court room, and made some reference to his version of the Creator's modus operandi with respect to death and punishment. Other remarks made in the course of an oratorical peroration are also within the scope of this group of points.

Except as indicated, the argument was not objected to. In those instances where no objection was made, the appellant Railroad Company waived its right to complain of the argument on appeal unless the argument is so prejudicial that an instruction by the trial court to the jury to disregard it would not have removed from the minds of the jury the prejudice produced. Southern Pacific Co. v. Hubbard, Sup. Ct., 297 S. W. 2d 120; Ramirez v. Acker, 138 S. W. 2d 1054. However, in view of objection being made to a part of it and admonition given by the court, the entire argument will be considered to determine whether the cumulative effect of all of the statements is so prejudicial and

inflammatory as to deny the appellant a fair trial. T. & N. O. R. Co. v. Wilkerson, 260 S. W. 2d 912; Panhandle & S. F. Ry. Co. v. Ray, 221 S. W. 2d 936, wr. ref., n. r. e.; Southwestern Greyhound Lines v. Dickerson, Sup. Ct., 236 S. W. 2d 115; Texas Employers' Ins. Ass'n v. Haywood, Sup. Ct., 266 S. W. 2d 856. The argument complained of does not fall within the rule of International-G. N. R. Co. v. Lane, T. C. A., 127 S. W. 1066; Ft. Worth & D. C. Ry. Co. v. Anderson, T. C. A., 194 S. W. 847; Galveston H. & S. A. Ry. Co. v. Cooper, 8 S. W. 68, 70 Tex. 67; Texas Cent. Ry. Co. v. Packer, T. C. A., 77 S. W. 42, no writ; Chicago R. I. & O. Ry. Co. v. Swain, T. C. A., 127 S. W. 1164; Texas Cent. Ry. Co. v. Pledger, T. C. A., 81 S. W. 755; where vicious attack is made upon a railroad defendant simply because it is a railroad; nor was the argument so improper as to amount to an unjust criticism and abuse of the appellant in the character and presentation of its defense, its witnesses or its counsel as condemned in Coleman v. Miller, T. C. A., 19 S. W. 2d 829, aff. 29 S. W. 2d 991; Airline Motor Coaches v. Campbell, T. C. A., 184 S. W. 2d 532, wr. ref.; Panhandle & S. F. Ry. Co. v. Ray, 221 S. W. 2d 936.

The use of a mathematical formula for illustrative purposes has had the sanction of the Texas courts in J. D. Wright & Sons Truck Line v. Chandler, 231 S. W. 2d 786; and in other jurisdictions see Boutang v. City Motor Bus Co., 80 N. W. 2d 30; Flaherty v. Minneapolis & St. L. Rwy. Co., 87 N. W. 2d 633, 60 A. L. R. 2d 1351; Imperial Oil, Ltd. v. Drlik, 234 Fed. 2d 4.

The reference to the jury's being called upon to do the dirty work and appellee reduced to the necessity of taking a stick and picking up paper on the school yard, etc., apparently was in reply to appellant's argument that a suit for this sum against a local farmer would be laughed out of court and the argument that the jury's action should be the same as against the hypothetical farmer; that is, laugh appellee out of court. It has been held traditionally that counsel may properly argue all phases of the evidence, draw reasonable deductions therefrom, reply to opposing argument, draw upon common knowledge, and suggest the extent of damage it is thought the evidence reflects. See Trial Civil Cases, 41-B Tex. Jur., Secs. 222, 235, 239. The argument in this case more properly falls within the rule of King v. Federal Underwriters Exchange, 144 Tex. 531, 191 S. W. 2d 855. Brinksmanship in this field has little to recommend it as juries are composed of sensible men and women and they usually fully discount the high-flown adjectives, purple prose, sophistry and hyperbole of counsel in his ardor.

A number of other serious questions have been presented and they have had serious attention and consideration, none, however, presents reversible error and they are respectfully overruled. A discussion of the question of excessiveness of the judgment is warranted, however.

The evidence adduced in the trial is contained in a 653-page statement of facts. Ten doctors testified, so even mention of all pertinent facts cannot be made within the permissible limits of an opinion. The appellant's com-

mendable effort to present the appellee's testimony fairly in his brief is adopted with slight editorial deletion to remove an occasional conclusion of the author and reference to the record:

> "Plaintiff, after first testifying with respect to his age, his education, which was partly in the 9th grade, and his early jobs, which consisted mostly of hard, manual labor, stated that he hired out as a fireman for the defendant in 1944; that he worked on an extra train; that he had kept a regular run until the war was over and after that he was placed on the extra board; that in 1951 until the date of the accident, October 12, 1955, he had a regular job either as a fireman or an engineer; that he was promoted to locomotive engineer in 1952; that his seniority on the fireman's roster was No. 20; that for the draft during World War II he was classified as 4-F because of a sunken chest; that he had suffered from sinus headaches prior to the accident in 1952 or 1953; that he could get no relief after two or three days in the hospital at Shreveport and was sent home; that his earnings for 1952 were $6,506.45; for 1953, $5,371.88; for 1954, $6,064.15; for 1955 until October 12, 1955, $5,429.54; that on the night of the collision the train was moving on the main line; that the only thing he remembered was that they came around a curve and hit him in the face; that the accident happened on October 12, 1955, and the next thing that he remembers was waking up in the hospital in Shreveport in December of that same year; that there wasn't much pain, but he couldn't handle his left arm or left leg; that all he could do was 'barely wiggle them a little bit,' meaning his fingers; the catheter was removed from his bladder two days after he regained consciousness; that his jaw was broken and flopped around to one side; that he was breathing normally through his nose at that time, but a week later a plate was placed in his jaw, four screws being placed in the left side, one

screw in the right side; that an incision was made in his throat to stick a pipe through the windpipe to permit breathing; that after the operation he had no pain in his jaws or any pain before the operation; that the pipe which was placed in his windpipe was removed after about three days and at this particular time he suffered in his shoulders some; that he had pain in his shoulders and neck for about four or five months; that he left the hospital on the 22nd day of December; that the pain in his shoulder lasted for four or five months; that by means of a rubber ball, which he, plaintiff, had requested, he got to the point where he could work his hand 'pretty good'; that after his release from the hospital on the 22nd he took a five-hour car trip to his home in Greenville, riding in the front seat beside his wife, with his head in her lap, or whatever position he could be in to get comfortable; that such ride didn't effect him; that he had no sensation of pain aside from his neck and shoulders; that after about a year following the instruction of Dr. Bullock, he could raise his left arm; that he experienced considerable discomfort from the temporary plate which was placed in his jaw and he imagines he went to see Dr. Pool in Greenville fifty or seventy-five times; that he had never gotten to where he could handle his jaws as he did before the accident and had no sensation or feeling in both of his jaws; that he had a sensation of lack of taste of any kind, but he further states 'I can eat them now pretty good'; that his tongue is partially paralyzed, according to Dr. Boykin; that he had headaches, which he describes as rather severe; that his left leg just wobbles; that he has fallen one hundred times; that he had a dead, numb feeling in his arm when he goes to sleep at night on his left shoulder; that his right shoulder has a spot in it which runs down and takes in two fingers when he sleeps on his right shoulder; that he doesn't know when his left leg is going to give way on him; that he has no lifting power in his left arm; that his eyes are weakening all the time; that on two occasions when he attempted to sleep

with his right arm back under his head, he was awakened twice with his arm 'paralyzed up there' * * *; that he doesn't have too much balance and can be walking along and stumble and stagger; that he has difficulty in sleeping more than three or four hours at a time and wakes up so uncomfortable he can't go back to sleep; that his left leg jumps anywhere from fifteen minutes to four hours every night; that he cannot remember dates since the accident; that he is unable to perform the duties of a railroad engineer or fireman and he is likewise unable to perform manual labor. * * * he did not make up his mind that he wouldn't go back to work as an engineer or fireman until the last few months.

"On cross-examination, plaintiff testified that he was 39 years of age on October 12, 1955; that he doesn't know who he was under the care of for the four weeks in Sulphur Springs; that he left the North Louisiana hospital toward the last of January, 1956, and was asked to report back for further examination in thirty days; that Dr. Oxford and Dr. Boykin reexamined him; that plaintiff did not remember whether he made three or four trips down there; that he was last there the latter part of July, 1957; that plaintiff had mowed the lawn last summer, which was 1957; that he would make a round and then sit down a while, then make another round; that he had been mowing it ever since; that he trimmed whatever was in the yard; that he began driving an automobile in the spring of 1956; that he drives it around in Greenville; that he hadn't hit anybody yet; that there are complaints about getting so close, * * * none of the neurologists have advised the plaintiff that he is a menace to public safety when he drives an automobile with a brain injury; that he had gained in weight at least thirty pounds since he left the hospital."

No effort to summarize the medical testimony will be made except to note that the most optimistic medical view

expressed was that appellee would be able to work as a "clerk, run a news stand, be a night watchman, or do any form of work which did not require him to lift heavy objects or stoop and bend or walk too much." Other doctors expressed the opinion that he was totally and permanently incapacitated from performing the duties of a railroad fireman or engineer and from doing manual work. The lay witnesses tended to corroborate the testimony of the appellee and indicate that his injuries were accompanied by great pain and sufferings.

Appellee has cited Texas & Pacific-Missouri Pacific Terminal R. Co. v. Welch, 179 Fed. 2d 880, and Dice v. Akron C. & Y. Co., 342 U. S. 359, 96 L. Ed. 398, in support of a view that excessiveness of verdicts in FELA cases are not subject to appellate review. At the time of writing this opinion, the final disposition of Deen v. Gulf, C. & S. F. Ry. Co., 275 2d 529, has not been made by the Supreme Court of the United States. This becomes unimportant, however, since this Court has reviewed the question in accordance with what is thought to be the State rule, that is, that this court may reduce or set aside this judgment if after consideration of the amount of the verdict and the evidence bearing upon the amount it finds the verdict excessive, Dallas Rwy. & Term. Co. v. Farnsworth, 227 S. W. 2d 1017; Wilson v. Freeman, 108 Tex. 212, 185 S. W. 993; Rule 440, V. A. T. R., and has concluded that the judgment is not excessive.

The element of damage in this case and the evidence pertaining thereto must be considered to determine whether

the award as a whole appears to be reasonable compensation for the injuries sustained. Recovery for wages lost from the time of the collision to the time of the trial has overwhelming support in the evidence. The appellee endured enormous mental and physical pain and suffering prior to trial and the evidence is abundant that he will probably continue to suffer in this respect for the remainder of his life. Reasonably a substantial damage award could be made upon these elements of past and future mental and physical pain and suffering. Appellee's injuries have substantially reduced and may entirely prevent any future earnings. Consideration of the appellee's employment and earning history together with his life expectancy and other relevant facts leads to a reasonable conclusion that the element of damage occasioned by the loss of future earnings is a very large sum. Considering all the evidence and the elements of damage involved, it cannot reasonably be said that appellee's damage is less than that awarded by the trial court, and therefore the award is not excessive.

The total amount of the award may cause the mind to boggle on first view, but on review the evidence is not such as to convince the court that upon the record the award is excessive. The court is not authorized to reduce an award because it is large or because it would work a hardship on the payer.

Examination of the facts and the authorities upon the question presented in the appeal leads to the conclusion that

reversible error is not shown and each of appellant's points of error is respectfully overruled.

The judgment of the trial court is affirmed.

T. C. CHADWICK
Chief Justice

June 16, 1959.
Filed June 16, 1959.

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No. 643

In the

Supreme Court of the United States

OCTOBER TERM, 1959

LOUISIANA & ARKANSAS RAILWAY COMPANY,
Petitioner,

v.

J. C. MULLINS, JR.,
Respondent.

SEPARATE APPENDIX UNDER 28 U. S. C. A., RULE 12(1)(f), IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SIXTH SUPREME JUDICIAL DISTRICT OF TEXAS

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To the Honorable Supreme Court of the United States:

In support of its petition for a writ of certiorari, the petitioner, Louisiana & Arkansas Railway Company, submits the following statements from the record, which was duly filed in this cause. The indices will follow those of the clerk of the court below, the reference being made to the number utilized by the clerk and the page numbers appearing in each separately numbered document.

QUESTION NO. 1 REPEATED

Whether an injured employee in an FELA case can prove the premium cost to him of a refund annuity, which insures the amount of his monthly earnings, together with speculative increases for the entire period of his life expectancy, utilizing such life expectancy as a multiplicand.

This question was properly raised in the court below and was decided adversely to the petitioner (No. 22, 1 and 2—326 S. W. 2d 263-265).

The complained of testimony was assigned as error in the petitioner's amended motion for a new trial [No. 1, (Transcript) 22-23], assignment of error No. 18 reading as follows:

"18.

"The court erred in overruling the objection of the defendant to the answer of the witness, M. B. Gammill, such answer being as follows:

"'TO THE 15TH DIRECT INTERROGATORY THE WITNESS ANSWERS:

"'Assuming that J. C. Mullins, Jr., was born on August 23, 1916, he would be forty-one years of age on February 12, 1958, the date from which the payments would be made. Using the Commissioner's 1941 Standard Ordinary Mortality Table and a rate of interest of 2½% per annum, compounded annually, I have computed the various specified monthly income payments, single premiums, to be:

"'a. Single premium for $517.00 per month is $126,881.62;

"'b. Single premium for $540.00 per month is $132,526.26;

" 'c. Single premium for $575.00 per month is $141,-115.93;

" 'd. Single premium for $600.00 per month is $147,-251.40;

" 'e. Single premium for $625.00 per month is $153,-386.88;

" '(During the reading of the deposition of Mr. Gammill, the defendant objected to Interrogatory No. 15 and the answer given, and the objection was as follows:)

" 'MR. TOUCHSTONE: The defendant objects to the question and the answer because it is irrelevant and it's incompetent to any issue in the case.

" 'THE COURT: Objection overruled.

" 'MR. TOUCHSTONE: Exception.

" 'MR. BRIAN: Now, in connection with the deposition, Your Honor, we offer in connection with the deposition, without reading, the Exhibits "A", "B", and "C", attached to the interrogatories of Mr. Gammill, identified by him and attached, initaled as requested.

" 'MR. TOUCHSTONE: The same objection to the exhibits, they are irrelevant and incompetent to any issue in the case, and move that they be withdrawn from the jury.

" 'THE COURT: I overrule the objection.

" 'MR. TOUCHSTONE: Note our exception.'

" 'This assignment is also directed to the Exhibits "A", "B", and "C", which were objected to. Such evidence was incompetent, illegal and irrelevant to any legitimate inquiry, because it injected an illegal, improper and highly prejudicial element of damages into the cause which does not exist under the Federal Employers Liability Act; that the defendant railroad is not responsible for its negligence, and any sum of money must be reduced or discounted by deducting

> therefrom annually an amount equal to the rate of interest at which such sum could be safely and securely invested during the period for which such damages may be allowed. The injection of the cost of an annuity policy for the full life expectancy of the plaintiff is therefore an illegal and improper measure of damage which is not provided for by the Federal Employers Liability Act and therefore the injection of such issue was prejudicial to the right of the defendant railroad and was reasonably calculated to cause the return of a verdict of $150,000.00 in this cause, that the introduction of such cost based upon hypothetical increases in wages was purely conjectural and speculative and therefore was no basis for the introduction of such evidence.'"

The above quoted testimony by the actuary Gammill appears in the statement of facts No. 2, 587-598.

Petitioner also moved to strike the entire deposition, including Exhibits A, B, and C, which were calculations of the actuary, using the life expectancy as a multiplicand. Such motion appears at pp. 599-600 of statement of facts No. 2.

The action of the court in overruling such motion to strike was duly assigned as error in its amended motion for a new trial, such assignment being here quoted:

"19.

> "The court erred in overruling the defendant's motion duly made in the absence of the jury to strike the deposition of M. B. Gammill and withdraw the same from the consideration of the jury for the reason that such deposition in its entirety injected improper, prejudicial and baseless elements of damages in the cause and allowed the jury to consider improper, illegal

and irrelevant damages based upon an erroneous construction of the Federal Employers Liability Act." [No. 1 (Transcript) 23].

The deposition of the actuary Gammill, which included the above quoted testimony, was the only evidence before the jury upon the issue of present cash value of the award for loss of earning capacity under the FELA. That the purpose was to secure and insure a monthly income to the plaintiff, contrary to the provisions of the FELA and the decision of this Court and the interpretations placed thereon by this Court, is fully apparent by the following quotation from the argument of the Honorable C. A. Brian, one of the attorneys for the plaintiff:

> "Now, you heard the testimony of the actuarial expert which is without contradiction in this record, this man's life expectancy is 28.43 years; in other words, men his age normally will be expected to live an additional 28.43 years and that was calculated from February 12, 1958; that what this man has before him, is 28.43 years average life expectancy. Oh, it might be said: 'Well, he won't live that long,' by the same token he might live a lot longer, this is the average of what men and women his age live. So, on this basis of his earnings as of February 1st being $588.60, we have taken a figure of $575.00 a month, and if you were listening and can remember Mr. Gammill's testimony you will find that a single payment made now necessary to bring an average of $575.00 a month over the remainder of his life expectancy, that single payment would have to be $141,115.93. In other words, on this basis this man could reasonably be expected to lose, without one single further increase in his earning power from now on, without a nickel's worth of increase, he could reasonably be expected to lose in earnings the sum of $156,411.41." (pp. 6 and 7 of the argument of C. A. Brian; No. 6.)

That there was no intention on the part of plaintiff to follow the formula under the FELA is further apparent from the argument by the Honorable Franklin Jones, another of the plaintiff's attorneys:

> "* * * He couldn't be a capitalist, the purpose of this testimony of Mr. Gammill was to show you what that money would amount to, what it would take to pay him his monthly wage just like any other wage earner, he's accustomed to having it coming in every month, just take it down and pay the refrigerator man and the automobile man and everybody else. Now, for that reason we asked this man to figure out, as those questions show in the deposition, figure out just what it would take to give this man a certain earning per month, and he did that, and he said of course it would make some interest on it, so I am going to discount it on account of that interest, and when I do that I will figure it to where with the interest and the total sum if it was paid so much a month that the interest and money would both be gone; now, that's his figures, we have got here, I know of no other way to arrive at the present value of this money and that is to get a person skilled in that field. * * *" (P. 8 of the argument of Franklin Jones; No. 10.)

QUESTION NO. 2 REPEATED

Whether an injured employee can prove and recover as an element of damages under the FELA loss of his love and affection for his wife and daughter and mistreatment of his wife and daughter after the injuries, together with the pain and suffering which such injured employee caused them.

Such question was duly and properly presented to the court below and was decided adversely to the petitioner. (Opinion of the court below No. 22, pp. 3 and 4; 326 S. W. 2d 263, pp. 265-266.)

The petitioner duly objected to the introduction of such harmful evidence in the trial court and duly excepted to the action of the court in overruling such objections; petitioner likewise objected to the prejudicial incidents which occurred during the trial by reason of the injection of such issue into the cause. The objections and exceptions appear in connection with the following assignments of error, which appeared in the petitioner's amended motion for a new trial [No. 1 (Transcript) pp. 13-14, 26-31] and were duly presented to the trial court, but were overruled. Such assignments of error being:

"3.

"The Court erred in overruling the hereinafter duly and properly made objection to erroneous, incompetent evidence which was introduced on the part of the plaintiff over such objection, because such evidence enabled the plaintiff to inject the issue of love and affection on the part of the plaintiff's family to him and on his part to his family, which issue and element of damages was illegal, improper and highly prejudicial to the rights of the defendant railroad. Such objection and the erroneous evidence admitted occurred while the plaintiff was on the witness stand and is quoted:

"'Q. Now, what was his attitude, Mr. Winans, toward his family in those days?

" A. Well, I don't know how to express that.

"'Q. Well, did he have, appear to have an interest or—

"'MR. TOUCHSTONE: If the court please, that's going into a matter that we believe under the Federal Employees' Liability Act is not a proper element of the nature of damages.

"'It's, of course, highly prejudicial and inflammatory, and is not recoverable under the act, and we object to it.

"'MR. BRIAN: My attitude about it is, of course that the question of physical and mental pain—

"'(Jury excused from the courtroom.)

"'MR. TOUCHSTONE: I will state my objection again, Your Honor. This suit is under the Federal Employees' Liability Act and it fixes the sole beneficiary as the plaintiff, and is to recover for him pecuniary benefits. The members of his family, his wife or others in his family are not beneficiaries and they are not parties, and they are given no part by this Act of Congress in the recovery. And now he is seeking to go into a matter about the nature of his relationship with his family to show the benefit to the members of the family that this family man was. A very praiseworthy thing of course, but under the Federal Employees' Liability Act it is not recoverable, and certainly is prejudicial and inflammatory, and the defendant objects to any testimony along that line.

"'MR. BRIAN: Well, our view about that is simply this, Your Honor. That any testimony which tends to show a change in the personality of this man is a damage to him in the sense that it shows physical and mental changes. Now, that's a part of the damage recoverable under the Federal Employees' Liability Act by him, because if his, just as his physical ability has been altered. If this ability to get along with his family or to act as the head of a household has been altered, that's an item that's just as recoverable in the way of mental changes as physical changes would be.

"'MR. JONES: The type of evidence to be offered is symptomatic of brain damage, and that is personality change. All the doctors will tell you that, so the

only way we know to prove the symptoms is to show how the man acted before and how he acted after. I presume that could be connected up.

" 'MR. TOUCHSTONE: The trouble about that is, the fallacy in it is you can't let it in for one purpose without it being effective for all purposes, and this man is the only person that has any ownership in this cause of action, and it inevitably brings in the family loss and family's suffering at seeing him different, and it's highly prejudicial and damaging to the defendant, and we don't think it ought to go in for any purposes. Now, if it was a common law, liability case where the wife is suing or a member of the family is suing, you have a different situation, but here the Act of Congress, known as the Federal Employees' Liability Act, fixes the sole cause of action in the man, and he cannot recover for such things as they are going into now. It can only be for pecuniary benefits, loss of pecuniary benefits, and this is certainly not pecuniary benefits they are going into.

" 'THE COURT: I will overrule the objection and give you full bill, sir.

" '(Jury returns into courtroom.)

" 'Q. My question to you, Mr. Winans, is what's Jack's attitude towards his daughter and his wife, particularly his daughter, was before this collision occurred?

" 'MR. TOUCHSTONE: Same objection on all the grounds * * *.

" 'THE COURT: Yes, sir.

" 'A. I don't know how to explain that to you, he was just as good to her as any man could be to a daughter, I will say that.

" 'Q. Did he seem interested in her welfare?

" 'A. Oh, yes, very much so.

"'Q. And whether or not they seemed to get along very well?

"'A. Yes sir.

"'MR. TOUCHSTONE: Our same objection goes to all of this.

"'THE COURT: Yes sir, I will give you a full bill'." (No. 1, 13-14.)

The above quotation of testimony and proceedings had thereon is sustained by the record No. 2 (Vol. 1 Statement of Facts) 162-165.

"22.

"The court erred in overruling the objection of the defendant to the question propounded to the witness, Mrs. Mullins, wife of the plaintiff, reading as follows:

"'Q. And what was his attitude and disposition towards his daughter in those days?

"'MR. TOUCHSTONE: Your Honor, I don't see the relevancy or pertinency of this exception to arouse inflammation and prejudice in the minds of the jury.

"'MR. BRIAN: I expect to show personality changes.

"'MR. TOUCHSTONE: I understand that, Your Honor wouldn't let him go into that with another witness, and we object to going into it now. If the court please, it's not an element of recovery under the Federal Employees' Liability Act, it's restricted to pecuniary benefits, and this does not go in pecuniary benefits, and we object to it because it's not recoverable, and it's not pertinent, irrelevant and highly prejudicial.

"'THE COURT: I will overrule the objection.

"'MR. TOUCHSTONE: Note our exception, and we would like for our bill to go to all this line of testimony.

"'THE COURT: Yes, surely will.

"'What was his attitude and disposition towards his daughter, Mrs. Mullins?

"'Oh, we all had a good time, just a happy home, everybody was always happy.

"'MR. TOUCHSTONE: We object to that on all the grounds stated and further it's not responsive; she's telling about the attitude of all of them in the home.

"'THE WITNESS: Well, he was too.

"'MR. TOUCHSTONE: We move to strike it, Your Honor, because it's not responsive and on all the other grounds. If the court please, I think this is serious, it's the plaintiff's lawsuit, but the act of Congress restricts him to the recovery of pecuniary benefits. Now, we let this witness not only go into his atttude, but the attitude of his wife and daughter which is not relevant and not pertinent and not recoverable under the Act but arouses the prejudicial and inflammatory aspect.

"'THE COURT: I sustain the objection so far as the attitude of his wife or the attitude of his daughter, and just simply as to him, his attitude.

"'MR. TOUCHSTONE: Then we move Your Honor to instruct the jury not to consider her testimony about that, what's been given.

"'THE COURT: Members of the jury, you will not consider any statement made by the witness concerning the attitude of the wife or the daughter at all in this case, and you will not consider it for any purpose, and blot as nearly as you can out of your minds.

"'Q. I am specifically asking, Mr. Mullins, only about Jack's attitude and temperament, don't you understand, never mind yours or Sandras.

"'MR. TOUCHSTONE: Our bill goes to this because it's not recoverable under the Act.

"'THE COURT: Yes.'

"That such effort on the part of the plaintiff's attorney was a successful attempt to inject the issue of love and affection and the loss thereof into the cause, which element was improper, illegal and an attempt to prejudice the defendant railroad before the jury, which prejudice the admonitory instruction could not have removed; that such erroneous injections of such issue into the cause was reasonably calculated to cause and probably did cause the return of an erroneous verdict and the rendition of an improper judgment." (No. 1, 26-27.)

The above quotation of testimony and proceedings had thereon is sustained by the record No. 3 (Vol. 2 Statement of Facts), 621-624.

"24.

"The court erred in permitting the witness, Mrs. Mullins, wife of the plaintiff, to testify to the following:

" 'Q. By the way had he ever cried before that?

" 'A. He cried in the hospital.

" 'MR. TOUCHSTONE: That's the same thing, Your Honor, what he did before is like the question of striking her before, that's for prejudicial purposes.

" 'MR. JONES: Your Honor, I want to interpose this thought, how are you going to show a personality change without showing what he was before and then showing the changes afterwards.

" 'MR. TOUCHSTONE: Now, if the court please, what difference could it possibly make in the cause of action created by Congress here for pecuniary benefits, as to whether a man had cried before an accident or not, the thing is absurd on its face.'

" 'MR. JONES: Your Honor, it makes this difference: As all of these doctors have testified, that is one of the symptoms of brain injuries is personality changes; we have got testimony here as to the degree of that injury, and we think we certainly should be allowed to show the symptoms that the doctors say indicates a severe brain injury, and also I don't agree with my friend that the federal act shuts a man down and says your dollars are all that count.

" 'MR. TOUCHSTONE: It's pecuniary benefits.

" 'THE COURT: I overrule the objection.

" 'MR. TOUCHSTONE: Note our exception.

" 'Q. My question right now, Mrs. Mullins, you mentioned his crying after he got home, had he cried any in the hospital at Sulphur Springs or Shreveport, either one, I don't know?

" 'A. Yessir.

" 'Q. Where was that?

" 'A. At Shreveport.

" 'Q. About how many times?

" 'A. Oh, that happened real often.

" 'Q. Well, now, Mrs. Mullins, I now want to ask you the question, had you ever observed your husband cry before he was hurt?

" 'MR. TOUCHSTONE: May we have our same bill to this on all the grounds stated.

" 'Q. Go ahead, Mrs. Mullins, did you understand that?

" 'A. You want me to answer that?

" 'Q. Yes Ma'am.

" 'A. No, he never cried before.

"'Q. Now, how long did he cry when he got home there?

"'A. It just upset him very much getting home, our home to him was just like a strange home, he didn't know anything, he didn't know what room, which room was which.

"'Q. How long did he spend there in bed before being up and about in Greenville?

"'A. Well, he went to bed when he got home, but now he got up the next morning, see, he was able to be up and down at that time, I got him up.'" (No. 1, 28-29.)

The above quotation of testimony and proceedings had thereon is sustained by the record No. 2 (Vol. 3 Statement of Facts), 641-642.

"25.

"The court erred in permitting the witness, Mrs. Mullins, wife of the plaintiff, to testify as follows:

"'Q. Well, do you mean that his attitude towards you was different, Mrs. Mullins?

"'A. Yes, he wanted me to do something, I couldn't do anything.

"'Q. Now, is there anything else that you have observed about his attitude or treatment of you and Sandra Gail that was different as compared with the way he was before he was hurt?

"'MR. TOUCHSTONE: Our same objection and bill on the same grounds heretofore stated goes to that question.

"'A. Can I answer.

"'Q. Yes ma'am.

"'MR. TOUCHSTONE: Note our exception.

"'A. Well, he is very harsh now to both of us, and especially to her, he kept her upset and crying; when he first got home she cried, he kept her crying most of the time. She was thirteen, just barely thirteen at that time, and he thought she should do all the work around the house while I tended to him * * *

"'MR. TOUCHSTONE: I don't like to interrupt you, Mrs. Mullins, but if I may address the court, I think the court can see the obviously highly prejudicial and inflammatory effect of the testimony that this witness is now giving. It's what I have been objecting to because under the law assigned to it, and I submit to Your Honor that by the Act of Congress it's not a recoverable element. The wounded feelings of this daughter or this wife, no matter how justified, they are inexplicably interwoven into the sympathy and natural human feelings of the jury, you can't separate them, and it's injecting an element in here that's not recoverable under the Act, but is highly, highly prejudicial and inflammatory to the defendant, and it's incompetent because it's about a matter that, an element that's not recoverable under the law.

"'THE COURT: I overrule the objection.

"'MR. TOUCHSTONE: Except.

"'Q. Now, Mrs. Mullins, with reference to the, what you have described about your husband, * * * strike that. Did your husband ever act that way towards his daughter and you before he was hurt? * *

"'MR. TOUCHSTONE: Our same objection, it was just this same analogy of his striking her that Your Honor ruled out and told the jury not to consider that. It's the same thing except it's a different thing.

"'THE COURT: This is attitude.

"'MR. TOUCHSTONE: No, he asked before, his question was before.

"'THE COURT: His attitude before and his attitude after. I overrule the objection.

"'MR. TOUCHSTONE: Exception.

"'Q. I say did your husband have, did he have that attitude towards you and your daughter before he was hurt?

"'A. No sir.

"'Q. Now, has that attitude or not continued, Mrs. Mullins, right up to this time?

"'A. It's better right now than it was when he first came home.

"'Q. But do you observe any difference in him as compared with the way he was before he was hurt?'

"That such evidence was improper, illegal, and an attempt to prejudice the defendant before the jury, which attempt succeeded in securing the return of the verdict in the sum of $150,000.00; that such error was reasonably calculated to cause and probably did cause the return of an erroneous verdict and the rendition of an improper judgment." (No. 1, 29-30.)

The above quotation of testimony and proceedings had thereon is sustained by the record No. 3 (Vol. 2 Statement of Facts), 646-648.

"26.

"The action of the court in admonishing the jury not to consider the following evidence could not have removed the prejudicial effect thereof, because such evidence was inflammatory and improper and a studied attempt to recover for loss of love and affection, anger, on the part of the plaintiff, and mistreatment of his family and was therefore incompetent for

any purpose as an element of damages under the Federal Employers Liability Act, such evidence being:

"'Q. Had you ever been struck by your husband?

"'A. No.

"'MR. TOUCHSTONE: Now we object to that, if the court please, when I object little lady if you would wait a minute till the court can rule before answering. We object to that, it's obviously for inflammatory and prejudicial purposes, and move the court to instruct the jury not to consider that.

"'MR. BRIAN: Well, I object that it is not obviously for inflammatory purposes, it's a recitation of the facts as I understand them.

"'THE COURT: I sustain the objection as to that.

"'MR. TOUCHSTONE: Our motion is that the court instruct the jury not to consider that.

"'THE COURT: Members of the jury, you will not consider the question and answer relative to Mr. Mullins striking his wife prior to this time, and it's withdrawn from your consideration and you will not consider it for any purpose.'

"That such incident was prejudicial to such a degree that its effect could not be removed by the instruction of the court." (No. 1, 30-31.)

The above quotation of testimony and proceedings had thereon is sustained by the record No. 3 (Vol. 2 Statement of Facts), 637-638.

"27.

"That the above and foregoing incidents during the testimony of Mrs. Mullins, the wife of the plaintiff,

were planned and studied attempts to inject the issue of loss of love and affection on the part of the plaintiff towards his family, anger, mistreatment of his family, and loss of love and affection towards them, and were so prejudicial and inflammatory in their effect that it could not be removed by any instruction of the court and such incidents and testimony were reasonably calculated to cause and probably did cause the rendition of an improper judgment." (No. 1, 31.)

That the purpose of plaintiff's counsel was to create prejudice, sympathy, and to enhance the verdict of the jury cannot be successfully denied in view of the following prejudicial argument, which was made by the Honorable Joe Chapman: (Italics the writer's.)

"'* * * Are we going to say, 'No, Jack, you get you a broom handle and get you a stick and pick up paper off the school grounds somewheres, we are not going to make the railroad pay you, *we are not going to send your daughter to college*, we are not going to keep you in a state of living that you are accustomed to, no, we are not going to take care of you, no sir, you just get out and do the best you can.' That's not the kind of jury we have got; that's not the way the people in Hopkins County think. * * *'" (pp. 4-5, Argument of Hon. Joe Chapman; No. 8.)

QUESTION NO. 3 REPEATED

Whether in an FELA case the trial court is bound to grant the request of the defendant (petitioner) to charge the jury that the amount of the verdict is not subject to income taxes.

The petitioner as defendant duly and properly requested the court to instruct the jury as follows:

"REQUESTED SPECIAL INSTRUCTION NO. 3

"Gentlemen of the Jury:

"You are charged as a matter of law that an award of damages for personal injuries is not subject to income taxes, or taxes of any character, therefore you will not consider income tax liability or tax liability of any character in your determination of the amount which you award."

Such request was refused by the trial court and the defendant railroad preserved its exception, and assigned such error in its amended motion for a new trial (No. 1, 43, 16). Such point of error was duly urged in the court below, but was overruled without consideration in the opinion. (Brief of appellant, No. 12, 94.)

QUESTION NO. 4 REPEATED

Whether over the objection of the defendant in an FELA case and also in the face of a requested charge the trial court could refuse to submit the correct mathematical formula for the reduction of the award to its present cash value.

The trial court's charge to the jury upon the very controlling and crucial issue of damages reads as follows:

"In arriving at the amount, if any, you allow the plaintiff by reason of the decrease, if any, in his ability to earn money in the future, you are instructed that you will allow the present value thereof only, and make your calculations of the same on the basis of the

amount, if any, found by you, bearing interest at the highest net rate of interest that can be had on money safely invested and secured.

"You will make your answer to the foregoing question such sum of money, if any, as if paid now in cash, will fairly and reasonably compensate the plaintiff for the elements of damage, if any, above set out, and none other." [No. 1 (Transcript) p. 10.]

The petitioner duly and timely objected and excepted to the court's charge in the following language:

"1.

"The defendant objects and excepts to the instructions appended to, immediately following, and a part of Special Issue No. 1, for the reason that the court fails to charge the jury in the words of the Federal Employers' Liability Act, under which this suit was brought, and on the contrary charges the jury in words foreign to and extraneous of said Federal Employers' Liability Act and adds to the elements provided by the Act as recoverable, and inserts in said instruction elements of recovery not contemplated or provided by said Act as follows:

" 'Further, you may take into consideration the mental and physical pain and suffering, if any, that plaintiff has endured from the date of his injury to the present, such mental and physical pain and sufferings, if any, he will in reasonable probability endure in the future, all as a direct and proximate result of his injury.'

"The defendant in objecting and excepting to this charge will respectfully show that the quoted portion of the court's charge is not embraced in, not contemplated nor provided by the Federal Employers' Liability Act and is not legally recoverable by the Plaintiff in this case, all to the prejudice and damage of the Defendant railway company.

"2.

"Defendant objects and excepts to the following paragraph in said instructions immediately following and as a part of Special Issue No. 1 as follows:

> " 'In arriving at the amount, if any, you will allow the plaintiff by reasons of decrease, if any, in his ability to earn money in the future, you are instructed that you will allow the present value thereof only and make your calculations of the same on the basis of the amount, if any, found by you, bearing interest at the highest net rate of interest that can be had on money safely invested and secured.'

because said instruction is upon the weight of the evidence and is not clear, but is confusing and unintelligible to the jury, and because the same does not fit and apply to the facts as adduced in the record before the jury in this case. Said paragraph restricts the right of the jury to take into consideration all of the evidence admitted in the case in arriving at their verdict, and in a sense tells the jury that they must be bound by the deposition of the Plaintiff offered in this case by the witness M. B. Gammill." [No. 1 (Transcript) 53-54.]

Such objections and exceptions were duly assigned as error in the petitioner's amended motion for a new trial, being assignments of error Nos. 1 and 2, pp. 12-13 of No. 1 Transcript.

The petitioner duly and timely requested the following charge upon such issue, which would have correctly charged the jury upon the mathematical formula to be employed by them in the reduction of any award to its present cash value; the first paragraph thereof would have likewise advised the jury that there was no assurance that the

plaintiff would remain in the employ of the defendant railroad for the period of his life expectancy. Such requested charge reads:

"REQUESTED SPECIAL INSTRUCTION NO. 2
"Gentlemen of the Jury:

"In arriving at any sum which you assess as damage because of either impaired or diminished earning capacity in the future, you must take into account the following: There is no assurance that plaintiff, J. C. Mullins, Jr., would have but for the accident and the injuries sustained as a direct and proximate cause thereof, continued in his employment as an engineer or a fireman for the remainder of his life or the expectancy thereof. You must take into account the fact that employees in the position such as that held by the plaintiff at the time of his death are by the rules of railroading subject to seniority; that there could be no assurance that the rule of seniority would have continued plaintiff in such employment for the remainder of his life or for any definite period; you must likewise consider the fact that strained economic conditions and mechanical advancements, inventions or improvements in transportation could result in the curtailment of the number of employees of railroads or the complete abolition of railroads as a means of transportation.

"In answering the above and foregoing issue inquiring with respect to damages, you are instructed that the amount allowed for any decreased ability to work and earn money in the future, if any, and the amount allowed for physical and mental suffering, if any, should be such amount as is the present value thereof, and in determining the present value thereof, you should take into consideration the rate of interest at which money can be safely and securely invested and determine the present value of any amount you may so allow by discounting the same or deducting therefrom annually an amount equal to the rate of interest

at which such sum could be safely and securely invested during the period for which you may allow such damages and make the balance your answer."

The defendant railroad duly presented such charge and preserved such error by assignment in its amended motion for a new trial (No. 1, 42, 15-16).

The action of the trial court was duly preserved as error in the court below, but decided adversely without comment. (R. No. 12, pp. 62, 93.)

FURTHER STATEMENT FROM THE RECORD

It is the petitioner's position that each of the above and foregoing errors, upon which review by this Court is respectfully sought, were fundamentally erroneous as a matter of law and therefore such errors were prejudicial and a denial of a fair trial. Before the petitioner is required to pay the sum of $150,000.00 as damages, it should be confronted with legal and competent evidence which is properly admissible under the holdings of this Court and other Federal Courts and the jury should be properly charged upon the legal measure of damages.

Without waiving such position, but in the event it is the holding of this Court that it must show more than errors of law, petitioner wishes to point out that it has not had a fair trial as a matter of law because of the above and foregoing prejudicial errors, because the record does not sustain a finding of damages in the sum of $150,000.00. The plaintiff (respondent) is not a wheelchair case, an amputee, or a living hulk. He has no difficulty in driving an automobile around his home town of Greenville, Texas. He is able to mow the lawn and trim whatever foliage is in the

yard. [No 2. (Vol. 1 Statement of Facts), 274-286]. The opinion of the court below recognizes the fact that he is not wholly disabled and incapacitated for all gainful pursuits. *(326 S. W. 2d 263, p. 270).*

Respectfully submitted,

O. O. TOUCHSTONE,
Attorney of Record for Petitioner, Louisiana & Arkansas Railway Company.
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A copy of the above and foregoing Separate Appendix Under 28 U. S. C. A., Rule 12 (1) (f) in Support of Petition for Writ of Certiorari to the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas has been mailed to the attorneys of record for the plaintiff, Messrs. Jones, Brian & Jones, P. O. Box 347, Marshall, Texas, on the 11th day of January, 1960, along with a copy of the Petition for Writ of Certiorari and notice of filing such petition and the record.

O. O. TOUCHSTONE, *Attorney of Record for Petitioner*

FILE COPY

FILED

In The
Supreme Court of The United States

OCTOBER TERM, 1959.

No. 613

LOUISIANA & ARKANSAS RAILWAY COMPANY,
Petitioner,
vs.
J. C. MELLINS, JR.,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

FRANKLIN JONES,
JONES, BEAN & JONES,
P. O. Box 347,
Marshall, Texas.

JOE N. CHAPMAN,
Sulphur Springs, Texas.

E. L. Mendenhall, Inc., 1108 Oak Street, Kansas City 6, Mo. HArrison 1-3030

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In The
Supreme Court of The United States

OCTOBER TERM, 1959.

No. 643

LOUISIANA & ARKANSAS RAILWAY COMPANY,
Petitioner,
vs.
J. C. MULLINS, JR.,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

In opposition to the Petition for Certiorari, Respondent says:

STATEMENT OF THE CASE.

The Petitioner admitted liability under the F. E. L. A., and the evidence was without dispute that the Respondent was seriously and permanently injured (see Petition, p. 31, *et seq.*; 326 S. W. 2d 269).

In essence, the only questions raised by the Petition concern the admissibility of testimony and the form of instructions given on the trial. Both subjects are governed by the rules of local practice, and present no reason for this Court to exercise its discretionary power of granting certiorari.[1]

ARGUMENT.

Discussion of Question No. One.

The Respondent could content himself with saying that by enacting the F. E. L. A., Congress made no attempt to regulate the jurisdiction of State courts or to

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1. *Central Vermont Ry. Co.* v. *White*, 238 U. S. 507, 515-516; 59 L. Ed. 1433, 1438; *Minneapolis & St. L. R. Co.* v. *Bombolis*, 241 U. S. 211, 60 L. Ed. 961; *Chesapeake & O. R. Co.* v. *DeAtley*, 241 U. S. 310, 316-317, 60 L. Ed. 1016, 1021; *Louisville & Nashville R. Co.* v. *Holloway*, 246 U. S. 525, 528, 61 L. Ed. 867, 870. Compare: *Huddleston* v. *Dwyer*, 322 U. S. 232, 88 L. Ed 1246; *Los Angeles F. & M. Co.* v. *Los Angeles*, 217 U. S. 217, 226, 54 L. Ed 737, 745; *Barrington* v. *Missouri*, 205 U. S. 483, 486, 51 L. Ed, 890, 894; and *West* v. *Louisiana*, 194 U. S. 258, 261, 48 L. Ed. 965, 969.

Indeed, if the Federal Rule of Practice controlled, perforce R. C. P. 43a (28 U. S. C. A.—F. R. C. P.) the principle of applying the most favorable view of admissibility, state or federal, would negative any error in receiving the evidence.

control or affect their modes of procedure, but merely imposed a duty on such courts when their ordinary jurisdiction is appropriate to take cognizance of the right of civil recovery arising under the Act.[2] There exists ample justification for his saying that the question of the admission of testimony, where it involves no direct or indirect construction of the Federal Statute, falls clearly within the province of the State court in declaring the local or general law.[3] However, the misconception under which Petitioner has labored in presenting Question No. One prompts us to offer some clarification.

While the term "refund annuity" was used in phrasing Interrogatory No. 15 to the witness Gammill (Petition, p. 6, S. A. 2-4), a later interrogatory inquired whether the witness' answers to No. 15 represented the present cash value of the varying sums paid out monthly over the life expectancy of the Respondent from the 12th of February, 1958, and to which question the witness answered as follows:

> "To the 19th Interrogatory the Witness answers:
>
> "My calculations in answer to Interrogatory No. 15 represent the present cash value of monthly payments of $517.00, $540.00, $575.00, $600.00 and $625.00, respectively, for the life expectancy period of J. C.

2. Employers' Liability cases (*Mondou* v. *New York N. H. & H. R. Co.*, 223 U. S. 1, 56, 56 L. Ed. 327, 348.

3. *Central Vermont R. Co.* v. *White*, 238 U. S. 507, 515-516, 59 L. Ed. 1433, 1438. The Texas Supreme Court has held evidence of the cost of annuities admissible in *H. & T. C. R. Co.* v. *Willie*, 53 Tex. 318, 328, and its Courts of Civil Appeals in *M. K. T. R. Co.* v. *Wright*, 311 S. W. 2d 440, 449, 455, and *T. & N. O. R. Co.* v. *Jacks*, 306 S. W. 2d 790, 796 (w. e. ref., n. r. e.)

Mullins, Jr., from the 12th day of February, 1958, on, and with one allowance for the investment of such present cash value at the rate of 2-1 2% per annum, compounded annually. In other words, if each of the respective single premiums for the various monthly payments specified were invested and earned 2-1 2% per annum, compounded annually, the total amount of the present cash value, together with the interest earned thereon, would be sufficient to make the respective monthly income payments for the life expectancy of Mr. J. C. Mullins, Jr., from the 12th day of February, 1958, on, *and without any residue or remainder at the end of such life expectancy period*" (S. F. 597-598). (Emphasis ours.)

Aside from the approval of this character of testimony by the Texas Supreme Court,[4] the pronouncements of this Court have suggested that the cost of annuities would be a proper guide for determining the present cash value of money.[5] Furthermore, an annuity table has been held properly admissible in evidence in an F. E. L. A. action in a decision from the 10th Circuit.[6]

The *Bartlebaugh* case[7] relied upon by Petitioner was distinguished in a later decision of the Ohio Court of Appeals on the ground that a straight annuity (as described in the response of the witness to Interrogatory 19) was

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4. *H. & T. C. R. Co.* v. *Willie*, 53 Tex. 318, 328.

5. See *Vicksburg, etc., R. Co.* v. *Putnam*, 118 U. S. 545, 554, 30 L. Ed. 257; and as suggested in *C. & O. R. Co.* v. *Kelly*, 241 U. S. 485, 60 L. Ed. 1117, 1123.

6. *So. Pac. Co.* v. *Klinge*, 65 F. 2d 85, 87 (cert. den.), 290 U. S. 657, 78 L. Ed. 569.

7. *Bartlebaugh* v. *Penn. R. Co.*, 82 N. E. 2d 853, p. 854.

inquired about in the later case rather than a refund annuity.[8] The only other case[9] relied on by Petitioner is hopelessly out of point. It turned on the proposition that the actuary could not make his calculations on the probable future gross earnings of a decedent, whereas in no event could the surviving beneficiaries have recovered more than the pecuniary contributions he would likely have made them had he lived, and necessarily, he could not have contributed his entire earnings, free of board and expense, to his family.

Lastly, the Petitioner by no means preserved an objection to the admissibility of the testimony in the trial court, or made proper motion to exclude it. There was no more than a motion to strike the deposition on the grounds as asserted by Counsel Sellers (S. F. 599), that Respondent was not a dead man, and, as asserted by Counsel Touchstone (S. F. 600), that the testimony assumed the Respondent's income was going to remain as it was, and possibly grow greater throughout his life.

We respectfully urge that there is no merit in Petitioner's contention that certiorari could be granted on its First Question.

Discussion of Question No. Two.

The testimony complained of in Petitioner's Second Question was offered under allegations of a change in the nervous and mental make-up of Respondent, including

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8. *Spence v. Comm. Mtr. Freight, Inc. of Indiana*, 90 O. App. 143, 127 N. E. 2d 427, 53 A. L. R. 2d 1445, 1453.

9. *Weatherbee v. Elgin J. & E. R. Co.*, 191 F. 2d 302.

personality changes,[10] and of mental and physical pain and anguish past and future.[11] A medical witness offered by Petitioner testified that personality changes could be objective to one observing them, and that the physician had to accept the word of the family on whether or not the changes had occurred.[12] Damages for mental pain and anguish are recoverable both under Texas law and the F. E. L. A.[13]

The testimony under attack bore directly on this issue and was admissible under Texas practice.[14]

Discussion of Questions No. Three and Four.

Since Questions Three and Four both complain of the instructions given by the trial court on the issue of damages, Respondent has grouped them for reply. In the first place, all complaint at the instructions partakes of criticisms as to form, the correctness of which is governed by the decisions of the highest State court.[15] Irrespective of the State rule, however, the language of the Court's charge (S. A. 19-20, Tr. 10) on the subject of present cash

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10. Tr. 4, lines 20-23.

11. Tr. 6, lines 8-13.

12. S. F. 462-463.

13. 13 Tex. Jur., Damages, Sec. 85, p. 183 Sec. 87, pp. 185-186; and Sec. 88, pp. 187-188; *Vicksburg, etc., R. Co.* v. *Putnam*, 118 U. S. 545, 554; and *C. & O. R. Co.* v. *Carnahan*, 241 U. S. 244, 60 L. Ed. 979, 981-982.

14. *McGrew* v. *St. Louis S. F. & T. R. Co.*, 74 S. W. 816, 818 (w. e. dism. w. o. j.); *Gulf C. & S. F. R. Co.* v. *Moore*, 68 S. W. 559 (err. ref.); *Western Union Telegraph Co.* v. *Simmons*, 75 S. W. 822, 824 (ref. rec. w. e.); and for general rule, see 15 Am. Jur., Sec. 334, p. 772, Note 2.

15. *C. & O. R. Co.* v. *DeAtley*, 241 U. S. 310, 316, 60 L. Ed. 1016, 1020; *Louisville & Nashville R. Co.* v. *E. S. Holloway*, 246 U. S. 525, 62 L. Ed. 867, 870.

value of future earnings is practically identical with the charge requested and held wrongfully refused by this Court in an earlier case under the F. E. L. A.[16]

Just as Petitioner suggests (his brief p. 15), the Charge it requested would have improperly required the discount of future pain and suffering of the Respondent, for which there could have been no logical basis.[17] Furthermore, the Charge (see S. A. 22) requested by Petitioner was properly refused under Texas rules of practice and procedure. It is couched somewhat in the veip of *Deor's Lament* throughout the first paragraph, and falls within the State prohibition of charges which are erroneous, inapplicable, invasive of the jury's province, abstract, ambiguous, or unintelligible, misleading, argumentative, and unnecessary.[18] In addition to the defects summarized, the Charge had not a shred of pleadings in support of the dour facts catalogued in its first paragraph, for which reason it was properly refused.[19]

Question No. Three may be disposed of by the statement that both in Texas[20] and under the Federal Practice[21]

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16. *Gulf C. & S. F. R. Co.* v. *Moser*, 275 U. S. 133, 73 L. Ed. 200, 202.

17. *Louisville & N. R.* v. *Gayle*, 263 S. W. 763, 77 A. L. R. at 452; *Chicago & N. W. R. Co.* v. *Candler*, 283 Fed. 881, 28 A. L. R. 1174; and 37 A. L. R. 1451.

18. 24-A Tex. Jur., Instructions, Sec. 68, p. 626.

19. 13 Tex. Jur., Sec. 362, p. 601.

20. *M. K. & T. R. Co.* v. *McFerrin*, (Sup. Ct.), 291 S. W. 2d 931.

21. *N. Y. Central R. Co.* v. *Delich*, 252 F. 2d 522, 527; *Combs* v. *Chicago St. P., Minn. & Omaha Ry. Co.*, 135 Fed. Supp. 750; *O'Donnell* v. *Great N. R. Co.*, 109 Fed. Supp. 590; *Chicago N. W. R. Co.* v. *Curl*, 178 F. 2d 497, 502.

the giving of a charge that the jury should consider that an injured person will not have to pay income tax on his recovery in a damage suit would be improper. Indeed, the great weight of authority condems the giving of any such charge.[22]

Conclusion.

We respectfully urge that the Petition for Certiorari presents frivolous questions that can claim no special or important reason for the granting of the Writ, and pray its refusal.

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.....

22. 63 A. L. R. 2d 1393, 1398.

I, FRANKLIN JONES, one of the attorneys for the Respondent in the above case hereby certify that a true copy of the foregoing brief was on the ... day of January, A. D. 1960, duly mailed to Mr. O. O. Touchstone, 405-1416 Commerce Building, Dallas 1, Texas, Attorney of Record for Petitioner, to Messrs. Joseph R. Brown and C. H. Rimann, 114 West 11th Street, Kansas City 5, Missouri; and to Grover Sellers, Sulphur Springs, Texas.

....,

Of Counsel.